UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
_____/

REQUEST FOR A *JAMES* HEARING, MOTION IN LIMINE TO PRECLUDE THE ADMISSION OF ALLEGED CO-CONSPIRATOR STATEMENTS ABSENT A PRETRIAL SHOWING UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E), AND MEMORANDUM OF LAW IN SUPPORT

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Sixth Amendment's Confrontation Clause, Federal Rule of Evidence 801(d)(2)(E), and *United States v. James*, 590 F.2d 575 (5th Cir. 1979), respectfully requests that this Honorable Court preclude the admission of alleged co-conspirator statements against Mr. Fariz absent the government establishing, prior to trial or at least prior to their admission, that: (1) the conspiracy existed, (2) Mr. Fariz and the declarant were members of the conspiracy, and (3) the statement was made during the course of and in furtherance of the conspiracy. To determine these issues, Mr. Fariz requests a *James* hearing. As grounds in support, Mr. Fariz states:

I. Mr. Fariz Requests a Pretrial Determination of the Admissibility of Co-Conspirator Statements Under Federal Rule of Evidence 801(d)(2)(E)

A. Introduction

The indictment in this case alleges four wide-ranging conspiracies, the longest of which allegedly began in 1984, when Mr. Fariz was eleven years old. The government does not appear to allege that Mr. Fariz himself became a member of any of the alleged conspiracies until at least some time in 1995.[1] The conspiracy allegedly includes the nine named Defendants, including Mr. Fariz's three co-defendants before the Court, namely Sami Al-Arian, Sameeh Hammoudeh, and Ghassan Ballut, and five who apparently will not be brought to answer the charges in this case, namely Ramadan Shallah, Bashir Nafi, Muhammed Al-Khatib, Abd Al Aziz Awda, and Mazen Al-Najjar. The conspiracy also allegedly includes at least 120 unindicted co-conspirators, including numerous individuals and entities in the United States and abroad.

The government will seek to introduce at trial the hearsay statements of these individuals and entities against Mr. Fariz as co-conspirator statements, pursuant to Federal Rule of Evidence 801(d)(2)(E). Indeed, Mr. Fariz anticipates that the government may seek to introduce hundreds of such statements. Mr. Fariz objects to the admission of any and all

---

[1] *See* Doc. 636, Superseding Indictment, at 61 (listing Overt Act 172, occurring on or about March 15, 1995, as the first one allegedly involving Mr. Fariz); *see also* Doc. 63, Tr. of Bond Hearing on Mar. 20, 2003, at 55 (statement of AUSA Walter Furr) ("[Mr. Fariz] enters the picture . . . in this organization, from what we can tell, June 16, 1995. It's overt act 176 [of the original indictment].").

hearsay statements of co-conspirators absent a showing that meets the requirements of Rule 801(d)(2)(E) and the Sixth Amendment's Confrontation Clause.

B. Federal Rule of Evidence 801(d)(2)(E) and *James* Hearings

The Federal Rules of Evidence generally preclude the admission of hearsay, defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Except as provided by exceptions to this rule, hearsay is not admissible. Fed. R. Evid. 802. Certain statements are not hearsay, including if the "statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

In order for such a co-conspirator statement to be admissible against Mr. Fariz as a defendant in this case, the government must establish, by a preponderance of the evidence, that: (1) the conspiracy existed, (2) that Mr. Fariz and declarant were members of the conspiracy, and (3) the statement was made during the course and in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987); *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002). In making this determination, the Court may consider both the statements themselves and other independent evidence. *Bourjaily*, 483 U.S. at 180-81 (holding that the court may consider the statements along with independent evidence to determine the admissibility of hearsay under Rule 801(d)(2)(E), but reserving ruling on whether the court may base its determination on the statements alone); *United States v. Chestang*, 849 F.2d 528, 530–31 (11th Cir. 1988). After *Bourjaily*, Rule 801(d) was

expressly amended to provide that "[t]he contents of the statement shall be considered *but are not alone sufficient* to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . ." Fed. R. Evid. 801(d) (emphasis added); Fed. R. Evid. 801(d) advisory comm. notes.[2] Accordingly, the statements alone cannot be used to establish the existence of a conspiracy and the defendant's and declarant's participation in the conspiracy.

These preliminary findings concerning the admissibility of the hearsay statement must be made by the Court. *Bourjaily*, 483 U.S. at 175; *United States v. West*, 142 F.3d 1408, 1413-14 (11th Cir. 1998), *vacated on other grounds*, 526 U.S. 1155 (1999); Fed. R. Evid. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court."). Mr. Fariz respectfully submits that a pretrial hearing concerning the admissibility of any statements offered under Rule 801(d)(2)(E) would be the preferred course for determining these issues. *United States v. James*, 590 F.2d 575, 579-80 (5th Cir.

---

[2] The 1997 Advisory Committee Notes state:

> . . . .[T]he amendment resolves an issue which the [*Bourjaily*] Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question.

Fed. R. Evid. 801 advisory comm. notes.

1979) (en banc).[3] Such a hearing would avoid numerous interruptions at trial to determine the admissibility of statements, reduce the risk of the jury hearing inadmissible and perhaps prejudicial evidence, and could avoid wasting the jury's time on matters that ultimately should not have been presented. *James*, 590 F.2d at 577, 581-82; *see United States v. Roe*, 670 F.2d 956, 961-63 & n.2 (11th Cir. 1982) (noting that while a *James* hearing is not necessarily mandatory, "a district court should not lightly forego the advantages of a James hearing")[4]; *United States v. Grassi*, 616 F.2d 1295, 1300 (5th Cir. 1980) ("The purpose of the James hearing is to establish the existence, or nonexistence, of the predicates for the admission of a coconspirator's extrajudicial declaration before the declaration is made known to the jury."); *see also* Fed. R. Evid. 103(c) ("In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements to or offers of proof or asking questions in the

---

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

[4] As the Eleventh Circuit further explained:

> Because a James hearing is conducted outside the jury's presence and before the admission of the statements, the hearing (1) reduces the risk to the defendant that the jury will hear statements later shown to be inadmissible for lack of proper independent evidence, and (2) decreases the chance that a mistrial will be needed to eliminate the prejudice that may thereby result, with the "inevitable serious waste of time, energy and efficiency" that accompanies a mistrial.

Roe, 670 F.2d at 962 n.2 (quoting *James* 590 F.2d at 582).

hearing of the jury."). In short, the parties may be able to avoid wasting significant amounts of the jury's time if the admissibility of such statements is determined prior to trial.

The Eleventh Circuit has also indicated that the government may demonstrate that the statements meet the definition of Rule 801(d)(2)(E) by the close of its case. *See, e.g., United States v. Cross*, 928 F.2d 1030, 1052 n. 71 (11th Cir. 1991). In the circumstances of this case, however, a pretrial hearing presents a potentially more efficient and less prejudicial method for determining the admissibility of alleged co-conspirator statements. *See Roe*, 670 F.2d at 962 n.2 (quoting *James* 590 F.2d at 582). In particular, as described more fully in Part C, *infra*, Mr. Fariz has identified a number of issues that must be resolved before the statements would be admissible. A pretrial hearing would ensure that the government can meet its burden as the proponent of the evidence prior to introducing into evidence matters that should not have been presented to the jury.

Alternatively, if the Court chooses to proceed by allowing the government to "connect up" the evidence by the close of its case, Mr. Fariz would request that the Court require the government to introduce its independent proof of the conspiracy and Mr. Fariz's participation in it prior to admitting co-conspirator statements against Mr. Fariz. While generally the government need not rely only on independent evidence, *see Bourjaily*, 483 U.S. at 180-81, requiring the government to produce such evidence first avoids the danger of introducing inadmissible hearsay into the record if proof of the conspiracy and the Defendant's participation in it never materializes. *James*, 590 F.2d at 581-83 ("The district court should, whenever reasonably practicable, require the showing of a conspiracy and of

the connection of the defendant with it before admitting declarations of a coconspirator."); *see also Bourjaily*, 483 U.S. at 176 n.1 (declining to "express an opinion on the proper order of proof that trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial"). Since the government cannot rely solely on the co-conspirator statements themselves, Fed. R. Evid. 801(d)(2)(E), then the government will have to produce such independent evidence in any event. Should the Court proceed in the manner, Mr. Fariz would therefore alternatively request that the Court require this order of proof.

C. Statements at Issue in the Instant Case

On April 18, 2005, the government provided to the defense a list of the unindicted co-conspirators. (Attachment A). Mr. Fariz asserts that any statements of these alleged co-conspirators should not be admitted unless the government establishes, by a preponderance of the evidence, that the requirements of Rule 801(d)(2)(E) and the Confrontation Clause have been met with respect to each alleged statement. In particular, Mr. Fariz has identified the following illustrative issues that should be addressed at a *James* hearing.

1. Existence of a Conspiracy and Determination of the Declarant and Mr. Fariz as Co-Conspirators

Mr. Fariz objects to the introduction of any statements made by individuals or entities for which the government cannot establish, with independent evidence, their identity and that they are conspirators with Mr. Fariz. *See, e.g., West*, 142 F.3d at 1414 (finding that the court clearly erred in failing to determine (1) the author of a notebook, alleged to be a drug ledger,

(2) whether the author was a conspirator, and (3) whether the entries in the notebook were made in furtherance of the conspiracy); *United States v. Christopher*, 923 F.2d 1545, 1550-51 (11th Cir. 1991) ("We find Martin's challenged testimony to be inadmissible under Fed. R. Evid. 801(d)(2)(E). First, it is unclear who made the statement at issue. . . . Martin's uncertainty as to the identity of the declarant barely rises above the level of guesswork, and implicates the concerns which justify the general prohibition on hearsay evidence; namely, its lack of trustworthiness.") (citation omitted). For example, the government has listed at least 30 unidentified or partially unidentified individuals (first or last name unknown) in its list of co-conspirators, at least 22 unidentified individuals who wrote or sent faxes, and an unknown number of unidentified individuals who operated or wrote material on five websites. (Attachment A). Despite at least two years since the indictment of this case, and at least a decade (if not more) of investigation, the government has not identified these alleged co-conspirators. If the government seeks to introduce the statements of any of these co-conspirators, the government should come forward at a *James* hearing with evidence of the identities of these individuals and their membership in the conspiracy in order for any statements of these individuals to be admissible as nonhearsay against Mr. Fariz.

The websites illustrate Mr. Fariz's concerns regarding the admissibility of alleged co-conspirator statements under the evidentiary rules and Confrontation Clause. In a letter to counsel dated February 18, 2005, the government disclosed that it will seek to introduce internet website information as co-conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E). (Attachment B). The government claims that the "declarant" was the

enterprise. This argument, however, is circular. Rule 801(d)(2)(E) requires that the government show, by evidence independent of the statements themselves, the identity of the declarant and that the declarant was a member of the conspiracy. The government cannot rely on a mere tautology to establish the admissibility of such websites.

Mr. Fariz asks that the Court exclude any websites offered for which the government cannot establish the authenticity, reliability, and ultimate admissibility of these websites.[5] *See, e.g., Wady v. Provident Life & Accident Ins. Co.*, 216 F. Supp. 2d 1060, 1064-65 (C.D. Cal. 2002) (sustaining objection to introduction of websites, where proponent could not establish authenticity since witness had "no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents"); *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (affirming exclusion of websites where proponent could not establish authenticity, particularly that the group had posted the information on the website). As one court observed in the civil context:

> While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's Motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation.

---

[5] The government has also indicated that it will seek to offer such evidence alternatively under Federal Rules of Evidence 803(6), records of regularly conducted activity, and Rule 807, the residual hearsay exception. (Attachment B).

> Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in Fed. R. Civ. P. 807.

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999) (rejecting use of Coast Guard website to establish ownership of vessel, and requiring the plaintiff to "hunt for hard copy back-up documentation in admissible form from the United States Coast Guard or discover alternative information verifying what Plaintiff alleges"). In the criminal context, Mr. Fariz rights under the Confrontation Clause and the evidentiary rules demand that the rules be applied vigilantly. Accordingly, Mr. Fariz objects to the admission into evidence of hearsay statements contained in websites or any other statements absent a showing that meets Rule 801(d)(2)(E) and the Confrontation Clause.

2. Statements Made Outside the Scope of the Conspiracy

For any co-conspirator statements to be admissible against Mr. Fariz, the government must establish that Mr. Fariz and the declarant were conspirators, and that the statements were made in the course of the conspiracy. The dates of Mr. Fariz's and the declarant's involvement as conspirators is significant to this determination, and Mr. Fariz asserts that part of the government's showing must include this information.

In particular, Mr. Fariz objects to the admission of:

(a) statements made prior to the formation of a conspiracy (if a conspiracy was formed). *See, e.g., United States v. Tombrello*, 666 F.2d 485, 490-91 (11th Cir. 1982).

(b) statements made prior to Mr. Fariz's entrance into the conspiracy (if he ever entered). While the Eleventh Circuit has indicated that statements prior to the defendant's entrance are generally admissible against that defendant, *United States v. Lampley*, 68 F.3d 1296, 1300-01 (11th Cir. 1995),[6] the government would have to demonstrate that Mr. Fariz and the co-conspirator joined the same conspiracy. *See, e.g., United States v. Garcia*, 13 F.3d 1464, 1472-73 (11th Cir. 1994) (finding the court clearly erred in finding a statement to be in furtherance of the conspiracy, where the statement was made in April 1989, and the defendant was only charged with being part of the June 1989 conspiracy).

Mr. Fariz includes in his objection any statements made by alleged co-conspirators who left the conspiracy prior to the time that the government can establish Mr. Fariz entered into the conspiracy (if ever). *United States v. Koopmans*, 757 F.2d 901, 905 (7th Cir. 1985) (finding it erroneous to admit statement of declarant who had terminated his involvement in a conspiracy before the defendant joined); *cf. United States v. Beale*, 921 F.2d 1412, 1423 (11th Cir. 1991) (distinguishing *Koopmans* since declarant received proceeds from the robberies and continued to communicate with members of the conspiracy).

---

[6] Mr. Fariz recognizes this Eleventh Circuit precedent, but respectfully disagrees to the application of these holdings in this case. The rationale of the co-conspirator statement rule is that it is based on agency principles. *See Tombrello*, 666 F.2d at 490-91. Absent a showing of adoption on the part of Mr. Fariz, such statements should not be admissible. Otherwise, the government would be holding against Mr. Fariz potentially hundreds of statements by numerous individuals prior to the time Mr. Fariz is alleged to be (and will have to be independently shown to be) a conspirator. *See United States v. Gee*, 695 F.2d 1165, 1169 (9th Cir. 1983) (citations omitted).

A number of other alleged co-conspirator statements would be foreclosed from admission against Mr. Fariz for this reason. Mr. Fariz asserts that a *James* hearing is required to address these issues.

(c) statements made after the conspiracy has ended, or the conspirators are arrested, are not generally in furtherance of the conspiracy. *Krulewitch v. United States*, 336 U.S. 440, 441-45 (1949). Mr. Fariz objects to the admission of any such statements.

3. Statements Not in Furtherance of the Conspiracy

Mr. Fariz objects to the admission of any statements that were not in furtherance of the conspiracy. Statements concerning only idle conversation are not properly found to be in furtherance of the conspiracy. *See, e.g., United States v. Urbanik*, 801 F.2d 692, 697-99 (6th Cir. 1986) (finding that statements identifying defendant as a marijuana supplier were made as part of idle conversation "which though it touches upon, does not 'further,' a conspiracy," and should not have been admitted); *United States v. Bibbero*, 749 F.2d 581, 583-84 (9th Cir. 1984); *United States v. Means*, 695 F.2d 811, 818 (5th Cir. 1983); *United States v. McGuire*, 608 F.2d 1028, 1032 (5th Cir. 1979). Conversations that merely address past events are not "in furtherance." *See, e.g., United States v. Lieberman*, 637 F.2d 95, 102-03 (2d Cir. 1980).

A number of alleged co-conspirator statements would be foreclosed from admission against Mr. Fariz because they were also not "in furtherance" of the conspiracy. Mr. Fariz asserts that a *James* hearing is required to address these issues.

4. Confrontation Clause Rights

a. Confrontation Rights as to Co-Conspirator Statements

The Confrontation Clause provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. The Supreme Court has previously held that out-of-court co-conspirator statements must meet the requirements of Rule 801(d)(2)(E) in order to satisfy a defendant's Confrontation Clause rights. *See Bourjaily*, 483 U.S. at 181-84. Therefore, at a minimum, the government must establish each of the requirements of Rule 801(d)(2)(E) for the additional reason of ensuring Mr. Fariz's Sixth Amendment rights. Mr. Fariz objects to the admission of co-conspirator statements that do not satisfy Rule 801(d)(2)(E) also on Confrontation Clause grounds.

b. *Crawford* and Testimonial Statements

More recently, the Supreme Court held that the introduction of out-of-court statements that are testimonial in nature violates a defendant's Confrontation Clause rights absent a showing of unavailability and a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court did not fully define what statements are "testimonial." *Id.* at 68. At a minimum, the Court held that statements made to law enforcement are testimonial. *Id.* at 51-53 & n.4.

Co-conspirator statements made to law enforcement would not likely be "in furtherance" of the conspiracy, and would therefore not meet Rule 801(d)(2)(E). Such statements, made to law enforcement, would also be testimonial and would further be

inadmissible under *Crawford*. In this case, for example, statements of alleged co-conspirators made to law enforcement concerning the alleged acts of violence in the Middle East are clearly "testimonial" in nature. Such statements should not be admitted against Mr. Fariz because of his right to confrontation.

c. Confrontation Clause Concerns, Regardless of Whether An Alleged Co-Conspirator Statement is Testimonial

Other alleged co-conspirator statements that the government may seek to introduce may also raise Confrontation Clause and other evidentiary issues. In particular, the government will likely seek to introduce numerous claims of responsibility purportedly made by the PIJ concerning attacks in the Middle East. Many of these claims of responsibility are contained in faxes for which the government has not identified who wrote or sent the fax, or on websites run by unidentified individuals containing materials by unidentified authors. As addressed above, these statements do not appear to meet the requirements of Rule 801(d)(2)(E). Mr. Fariz contends that, at a *James* hearing or at least prior to the admission of any such co-conspirator statements, the government will also have to establish (1) the competency of the declarant to make the statement based on his or her personal knowledge, as opposed to hearsay (for example), and (2) that the declarant had the authority to speak on behalf of the PIJ as a group.

Otherwise, Mr. Fariz cannot be assured that his Confrontation Clause rights are protected. For example, simply because PIJ, or an individual, claims that PIJ perpetrated an attack does not mean, as a matter of fact, that PIJ did the attack. Claims may be made for

purposes of boasting, political posturing, and any number of other motives, or they may even be based on mistaken information. Additionally, it is not clear whether some claims are made by those authorized to make such statements on behalf of the PIJ, or whether they are based on the declarant's personal knowledge. If the declarant does not have personal knowledge, and instead bases the information on hearsay or other inadmissible information, that person would not be qualified to testify in court as to this information. Fed. R. Evid. 602. Certainly, then, an out-of-court statement that is not itself based on personal knowledge should not be admitted, even if the statement is non-testimonial. *Cf. Crawford*, *supra* (holding that out-of-court statement of wife based on her personal observation of husband stabbing another man made to the police was testimonial and its introduction violated the Confrontation Clause).

While Mr. Fariz recognizes that the Supreme Court has held that co-conspirator statements do not require an "independent indicia of reliability," *Bourjaily*, 483 U.S. at 183, these concerns demonstrate both why the government must be held to a sufficiently strong showing under Rule 801(d)(2)(E) and why other evidentiary issues should be considered in this Court's analysis. To hold that a statement meeting 801(d)(2)(E) also satisfies the right to confrontation is based on the assumption that a co-conspirator has knowledge of what he speaks, and as an agent of the conspiracy, may speak for the conspiracy. In the instant case, given the complexity of the issues, this assumption is untenable. Mr. Fariz should have the opportunity to cross-examine any individuals who have made alleged statements of claims of responsibility so he may test their knowledge and authority, rather than allowing the

government to introduce the statements as evidence. For this reason, out-of-court claims of responsibility on behalf of the PIJ should not be admissible.

II. Conclusion

Based on the foregoing, Mr, Fariz respectfully requests that this Court hold a *James* hearing pretrial during which the government must establish the admissibility of any co-conspirator statements pursuant to Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause. Alternatively, Mr. Fariz requests that this Court require the government to present its independent evidence of the admissibility of such statements prior to their admission at trial. Finally, Mr. Fariz ultimately objects to the admission into evidence of any statements that fail to meet the requirements of Rule 801(d)(2)(E) and the Confrontation Clause.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Florida Bar No. 0800031
Assistant Federal Public Defender
400 North Tampa Street, Suite 2700
Tampa, Florida 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
Attorney for Defendant Fariz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender